SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

No. 150

B. C. LEE, *Petitioner,*

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY, ET AL,
Respondents.

BRIEF FOR THE RESPONDENTS

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SYNOPSIS

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STATEMENT OF THE CASE

The Court of Appeals of Georgia, under instructions om the Supreme Court of the State, held that an action der the Federal Employers' Liability Act against the ilway Company and under the State law against O'Don-ll, as joint tort feasors, could not be maintained because misjoinder of defendants and of causes of action. A writ certiorari has been granted by this Court to review that dgment. See Record, pp. 62, 64; 147 Ga., 428; 21 Ga. pp., 558.

The evident purpose of plaintiff in joining O'Donnell as co-defendant was to avoid the trial of his case in the unty where the injury was received. Under the law of orgia, the venue of an action for personal injuries against railroad company as sole defendant is in the county where

the accident occurred, a judgment in any other county is void; but where the railroad is sued as a joint trespasser, a joint action may be brought and a joint judgment obtained in the county where a co-defendant resides.

(Civil Code of Ga. (1910), Secs. 2798 and 6541.)

The plaintiff was injured while coupling cars at Wadley, in Jefferson County, Georgia. O'Donnell, the engineer of the train, resided in Savannah, and plaintiff therefore brought in the City Court of Savannah, in Chatham County, Georgia, a joint action against the railway company and the engineer as co-defendant tort feasors. The railway company was charged with violating the Safety Appliance Act of Congress, in that the cars would not couple automatically; while the engineer, it was alleged, negligently moved the cars while plaintiff was adjusting the couplers. The action as originally filed was in two counts, the first count alleging that plaintiff was employed by the railway company in interstate commerce, and the second count omitting that allegation. The second count was abandoned by plaintiff when the defendants admitted by their amended answers that the injury occurred in interstate commerce. The case was tried solely upon the first count, which set forth a cause of action as against the railway company under the Federal Employers' Liability Act with the Safety Appliance Act of Congress, and as against O'Donnell, the engineer, under the law of Georgia. Each of the defendants demurred to the petition on the ground that there was a misjoinder of defendants and of causes of action. The trial court overruled this demurrer and there was a verdict for the plaintiff which was set aside on motion for new trial by defendants; a second verdict for plaintiff was likewise set aside by the trial judge. When the case reached the State Court of Appeals, that court, after hearing argument, certified to the Supreme Court of Georgia for decision and instruction the question of misjoinder of defendants and of causes of action which

was presented by the demurrers. The Supreme Court of the State held that the railway company and the engineer could not be sued as joint defendants under the Federal Employers' Liability Act. It also held that such joinder of defendants was not permissible in Georgia "even if it could be reconciled with the Federal Statute" because it "would lead to confusion and injustice," and because "the rules of law applicable to the several defendants are not the same." (147 Ga., 428, 431, Record, p. 63). The Court of Appeals, being so instructed, adopted the opinion of the Supreme Court of the State as it was in law bound to do, and reversed the judgment of the court below "because the court erred in overruling the defendants' demurrers setting up a misjoinder of parties defendant and a misjoinder of causes of action," and in disallowing amendments to defendants' pleas setting up such misjoinder. (Record, pp. 64, 69).

When the case was remitted to the trial court, an order was accordingly entered allowing plaintiff a stated time within which to amend so as to avoid the misjoinder (Record p. 73). Plaintiff declined to amend, insisting upon a joint action, and the petition was dismissed upon demurrer.

I.

THE DECISION OF THE SUPREME COURT OF GEORGIA, THAT A JOINT ACTION AGAINST THE RAILWAY COMPANY AND THE ENGINEER AS CO-TRESPASSERS COULD NOT BE MAINTAINED, WAS CLEARLY RIGHT.

(1) A joint liability of defendants is inconsistent with the scope and purpose of the Federal Employers' Liability Act.

The supremacy and exclusive character of this Federal Act in cases to which it applies is illustrated by many recent decisions of this Court. It stands decided that Congress by this Act "has taken complete charge of the subject matter

of the liability of common carriers by railroads engaged in interstate commerce to their employes injured or killed while employed in such service"; that the Act of Congress "is paramount and supersedes all State legislation or control regarding such liability"; that it is "exclusive in its operation, not merely cumulative"; and that the liability which it creates "cannot be supplemented or pieced out by the common or statute laws of the States."

> Michigan Central R. R. vs. Vreeland, 227 U. S., 59.
> S. A. L. Ry. vs. Horton, 233 U. S., 492.
> Wabash R. R. vs. Hayes, 234 U. S., 86.
> S. A. L. Ry. vs. Kenney, 240 U. S., 489.

In a recent case this Court said:

> "The liabilities and obligations of interstate railroad carriers to make compensation for personal injuries suffered by their employes while engaged in interstate commerce are regulated both inclusively and exclusively by the Federal Employers' Liability Act; Congress having thus fully covered the subject, no room exists for State regulation, even in respect of injuries occurring without fault as to which the Federal Act provides no remedy."

> N. Y. Cent. R. R. Co. vs. Winfield, 244 U. S., 147.

In another late case it was said:

> "Congress having declared when, how far, and to whom carriers should be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the State."

> New York Central R. R. vs. Tonsellito, 244 U. S., 360, 362.

The plaintiff does not contend that the State Court refused to apply the Federal Act in his suit. His only complaint is that the Court declined to allow him to obtain **a joint judgment** against the railway company and the individual defendant in one action against both as joint trespassers. Plaintiff was accorded the privilege of amending his petition so as to avoid the misjoinder of parties and causes of action, but he refused to amend and insisted upon a single judgment against both defendants as joint tort feasors. (Record, pp. 69, 73).

The essential purpose of a single action against several joint tort feasors is to recover one judgment against all for the whole damage, regardless of the culpability or degree of negligence of the several defendants. The damages cannot be apportioned between the defendants but must be assessed in a single sum, for the sole inquiry open in such cases is what damages the plaintiff has sustained **not who ought to pay them.**

> "Damages may be assessed in a single sum; they cannot be apportioned by the jury among the defendants, for the sole inquiry open is what damages plaintiff has sustained not who ought to pay them. Discrimination, according to the relative enormity of the acts of each, is not permitted."
>
> 38 Cyc., p. 492.
> Halsey vs. Woodruff, 9 Pick., 555.

"The rule is, in an action for joint tort against several defendants that the jury are to assess damages against all the defendants **jointly,** according to the

amount which in their judgment the most culpable of the defendants ought to pay. 2 Greenleaf's Evid., Sec. 277."

Simpson vs. Perry, 9 Ga., 508, 509.

"Those of the wrong doers who are sued together and found guilty in an action of tort are liable for the whole injury to plaintiff, without examining the question of the different degrees of culpability. As between themselves there is no contribution among several tort feasors. A verdict might, therefore, be rendered against two defendants and collected out of one, and he would have no right of contribution."

Washington Gas Light Company vs. Lansden, 172 U. S., 534, 552.

The Federal Employers' Liability Act gives a right of action to the interstate employe only for negligence of the employer (S. A. L. Ry. vs. Horton, 233 U. S., 492). The third section of the act provides that if the employe has been guilty of any contributory negligence the damages shall be diminished "in proportion to the amount of negligence attributable to such employe." Construing that section this Court holds that it requires damages awarded to the employe to be diminished in the proportion which his negligence bears to the combined negligence of himself and the defendant:

"We say this because the statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employe' means, and can only mean, that, where the casual negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional

amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; * * *"

N. & W. Ry. vs. Earnest, 229 U. S. 114, 122.

Manifestly the object of the Federal Act cannot be accomplished in a joint proceeding against the employer and other tort feasors where "the sole inquiry open is what damages the plaintiff has sustained, not who ought to pay"; and where there can be no comparison of negligence exclusively between the employer and employe.

The plaintiff bases his claim to a joint right of action and to a joint judgment against the railway company and O'Donnell, its engineer, on the Georgia Statute, which provides:

"Where several trespassers are sued jointly, the plaintiff may recover against all damages for the greatest injury done by either. But the jury may, in their verdict, specify the particular damages to be recovered of each, and judgment in such case must be entered severally."

Civil Code of Ga. (1910), Sec. 4512.

(Note:—The last sentence in the foregoing section of the Georgia Code does not apply to personal torts, but only to trespass upon property. Therefore, in the case at bar, the jury could not assess damages against the defendants in different amounts. Hay, et al. vs. Collins, 118 Ga., 243 (4); Lee vs. Central Ry, et al., 147 Ga., 428, 431).

In the Winfield case this Court stated that "there are weighty considerations why the controlling law should be uniform and not change at every state line," and pointed out that the intention of Congress was "to

withdraw all injuries to railroad employes in interstate commerce from the operation of varying State laws and to apply to them a national law having uniform operation throughout all the States."

New York Central R. R. vs. Winfield, supra.

Having in view the effect and operation of the Federal Employers' Liability Act and its object and purpose as declared in numerous decisions of this Court, it is certain the Supreme Court of Georgia correctly answered the question submitted by the State Court of Appeals that there could not be a joinder of the defendants in this case. It is evident that if the statutes of a State could be thus invoked to create a **joint liability** against several defendants in a case arising under the Federal Act, then the exclusive right to regulate the liability of an interstate employer to its employes, which Congress intended by the passage of the Act, would be wholly lost. In actions against the interstate employer and other joint defendants the regulation as well as the measure of such liability would be absolutely controlled by the various State statutes, because the liability of joint tort feasors is measured and regulated by State laws which in Georgia, as in most of the States, provide that each joint trespasser defendant may be held liable for the greatest injury done by the most culpable.

The attempted joinder of the defendant in this action is based on the statute of the State which authorizes suits against joint trespassers. If the Court below had upheld the plaintiff's contention regarding the joinder of defendants, it would in a very effective manner have subordinated the Federal Act to the State law. It is clear that if a State may authorize a suit against a common carrier by railroad subject to this Act as one of several joint tort feasors, and provide for and fix the liability of the joint defendants **inter sese,** as the Georgia statutes do (Secs. 4512, 4513, Code

of Georgia of 1910), then necessarily the liability of the railway company will be measured by the terms of the State law and not by the Act of Congress, for the liability of one is the liability of all the others against whom the verdict is rendered. That portion of this Georgia statute which authorizes the jury to specify the particular damage to be recovered of each defendant does not apply to personal torts. The jury trying the case at bar could not apportion damages between the defendants, but were required to return a verdict for one amount jointly against both defendants. A joint judgment based upon a single verdict against defendants as joint tort feasors is necessarily a judgment under the common or statute law of the State. It is the State law, not the Federal Act, that provides for and fixes the joint liability of the defendants in actions against joint trespassers, renders each one liable for the damages done by all who are found guilty in any degree, and provides for contribution among the several defendants. To permit a recovery upon the joinder of a railroad with other defendants as joint tort feasors in cases to which the Federal Act applies would effectually nullify the declared purpose of this Act of Congress, which was to establish an exclusive remedy for the employe, and a uniform rule of liability for the employer; and would instead permit as many different remedies and rules of liability and contribution as the separate State legislatures might enact to cover suits against joint trespassers.

In the case of Seaboard Air Line Railway vs. Horton, 233 U. S., 492, it was held that the State legislature had no power to determine the effect of contributory negligence or assumption of risk in cases under the Federal Act, "since this would, in effect, relegate to State control two of the essential factors that determine the responsibility of the employer." If a State may not control any of the essential factors that determine the responsibility of the employer,

assuredly it may not control the entire result as it would do if it could authorize an action against the interstate employer as one of several joint tort feasors, permit the plaintiff to recover against all damages for the greatest injury done by either, and fix the amount of contribution among the several tort feasors.

It is manifest that if it be legal to join as a tort feasor with the employer one of the co-employes of the plaintiff, it would be legal to join any one or more third persons, either individuals or corporations, whose concurrent negligence contributed to the injury. It is also manifest that if the Georgia statute can be applied to such cases, and the Federal employer made liable for the greatest injury done by any of its co-defendants, different rules of liability may be established under the statutes of the several States. It is not difficult to imagine the many "factors" arising out of State laws which would in such procedure determine the right of the employe and measure the liability of the interstate employer. The declared purpose of the Act would by this means be entirely destroyed. It is certain that the terms of the Federal Act do not authorize such joinder of defendants, and its object and purpose exclude any implication that it may be done.

If the interstate employer, under the Federal Employers' Liability Act, may be regarded as a joint tort feasor and subject to the legal incidents which ordinarily attach to that status, many questions controlling the final liability of the employer and the rights of the employe will of necessity be removed from the influence of the National Statute and remitted to State legislation and decision. Under the common law a release to one joint tort feasor is a release to all, but this rule may be varied by statute in the several States. In some States an unsatisfied judgment against one joint trespasser would bar an action against the other tort feasors. (Hunt vs. Bates, 7 R. I., 217; Wilkes vs. Jackson, 2 H. & M.,

355), while elsewhere it would not have that effect (Lovejoy vs. Murray, 3 Wall., 1). In some jurisdictions exemplary or vindictive damages might be found against all joint tort feasors, (Reizenstein vs. Clark, 104 Ia., 287; Railway Company vs. Bohon, 200 U. S., 221, 223), while in others such damages would not be allowed. In brief, the inevitable result of subjecting the interstate employer as one of several joint tort feasors would be to submit the liability of such employers and the rights of their employes to the diverse action of numerous State courts, whereas Congress plainly intended that there should be one uniform rule of liability in all the States.

> "A Federal Statute of this character will supplant the numerous State Statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employers' liability for personal injuries, instead of being subject to numerous rules, will be fixed by one rule in all the States."
>
> Report of Judiciary Committee of House on Federal Employers' Liability Act of 1908.
> New York Central R. R. Co. vs. Winfield, 244 U. S., 147, 150.

This court has said that "a State has an unquestionable right by its constitution and laws to regulate actions for negligence" and to provide that a "plaintiff may proceed jointly or severally against those liable," (C. N. O. & T. P. Ry. vs. Bohon, 200 U. S., 221, 226). It is not apparent how uniform liability of the interstate employer could be accomplished under this well recognized prerogative where some States grant and others deny the right to join the employer with others as joint tort feasor defendants.

The State practice and procedure determines when and how tort feasors may be sued jointly in the State courts;

the liability of co-trespassers as between themselves depends upon the statutes and decisions of the States; and each State decides for itself whether, and under what circumstances, there may be contribution among tort feasors. If the interstate employer is subject to suit as a joint trespasser under State laws, then such employer may be required, by State legislation, to reimburse in whole or in part a co-defendant who has satisfied a joint judgment. The Georgia law, for instance, provides:

> "If judgment is entered jointly against several trespassers, and is paid off by one, the others shall be liable to him for contribution."
>
> Civil Code of Georgia of 1910, Sec. 4513.
>
> "In case of joint, or of joint and several, or of several liabilities of two or more persons, where all are equally bound to bear the common burden, and one has paid more than his share, he is entitled to contribution from the others; and whenever the circumstances are such than an action at law will not give a complete remedy, equity may entertain jurisdiction."
>
> Ibid., Sec. 4588.

These rules of contribution under the Georgia Statutes have been thus construed by the State Supreme Court:

> "At common law, joint trespassers were not liable for contribution to each other. This rule was changed by our Code. See Secs. 3075, 3076 [now 4512, 4513]. It must be remembered, however, that in making joint trespassers liable for contribution, the principle of contribution as stated in Section 3132 [now 4588] of the Code (though that section is not expressly applicable to suits founded on torts), is to be observed. That prin-

ciple is, that where all are equally bound to bear the common burden, and one has paid more than his share, he is entitled to contribution from the others; but where, as among themselves, one should bear a less portion of the burden than the others, he should be subjected to no more than his fair share; and where, as to his co-defendants, one should bear no portion of the burden at all, he should, as to them, contribute nothing."

Chattahoochee Brick Co. vs. Braswell, 92 Ga., 631, 633.

The question naturally arises, what law, State or National, would determine the ultimate responsibility of the interstate employer to its employe, sued as a joint tort feasor, where the particular portion of the joint burden each co-defendant must bear, as between themselves, is subject to regulation by State legislation and decision? The question is easily answered. There is no room for doubt that an interstate employer, as a co-defendant, could be compelled to contribute its "fair share"—or any other proportion—of the whole burden, **as measured by the State law,** if such employer may in fact be joined as a joint tort feasor as contended by the plaintiff in the case at bar.

The State Supreme Court, in denying the right to join the defendants in the case at bar, said:

"A conclusion contrary to the one stated above, even if it could be reconciled with the Federal statute, would lead to confusion and injustice. Under our Civil Code, Sec. 4513, 'if judgment is entered jointly against several trespassers and is paid off by one, the others shall be liable to him for contribution.' If the carrier and its engineer were jointly liable under the conditions stated in the second question, a joint judgment would result against them, and they would be equally bound, regard-

> less of the fact that the duties imposed upon them are not the same. The jury would have no power in such a case to specify the particular damages to be recovered of each, since Civil Code, Sec. 4512 is not applicable to personal torts. McCalla vs. Shaw, 72 Ga., 458; Cox vs. Strickland, 120 Ga., 104." (Record, pp. 63 and 64).

The "confusion and injustice" of a joint action of this character may be further illustrated by considering the measure of damages recoverable under the Federal Act and the recovery allowed by the State law. In homicide cases under the Federal Act, where there is no conscious pain and suffering, damages are limited to the "actual pecuniary loss" sustained by the beneficiaries. (M. C. R.R. vs. Vreeland, 227 U. S., 59; G. C. & S. F. Ry. vs. McGinnis, 228 U. S., 173; N. & W. Ry. vs. Holbrook, 235 U. S., 625). Under the Georgia homicide statute the measure of damages is "the full value of the life of the deceased without deduction for necessary or other personal expenses of the deceased had he lived." (Georgia Civil Code of 1910, Secs. 4424, 4425 and 2782). In some States compensation in homicide cases may be awarded for grief and mental suffering. (Brown vs. So. Ry., 65 S. C., 260). In others punitive damages may be recovered when the act is wilful and the negligence is gross. (C. N. O. & T. P. Ry. vs. Bohon, 200 U. S., 221, 223, quoting Kentucky homicide statute). If an action for homicide against several tort feasors, including an interstate employer, proceeds to a joint judgment in one sum against all, not only would there be "injustice and confusion" but it would clearly be impossible to apply the Federal Act and restrict the liability of the interstate employer to the actual pecuniary loss sustained by the beneficiaries, where the other defendants are liable as for grief and mental suffering, for punitive damages, or for the full value of the life of the deceased without deduction for necessary or other personal expenses of deceased had he lived.

Much more might be said regarding the "injustice and confusion" which would result from a joint action against several defendants where, as in the case at bar, there is a charge against one of violation of the Safety Appliance Act of Congress. The individual defendant had no duty or obligation in regard to the maintenance of the safety appliance, but his co-defendant, the railway company, had, and if a failure to comply with the Safety Appliance Act contributed to the injury in any respect, whether the failure was due to negligence on the part of the railway company or not, the individual defendant is made liable with the railway company for the whole damage if they are suable as joint trespassers.

> "Disregard of the Safety Appliance Act is a wrongful act; and where it results in damage to one of the class for whose especial benefit it was enacted, the right to recover damages from the party in default is implied: Ubi jus ibi remedium."
>
> Texas & Pac. Ry. Co. vs. Rigsby, 241 U. S., 33 (1).

> "Under the Safety Appliance Act, if the equipment was defective or out of repair, the question of whether it was attributable to the Company's negligence or not is immaterial."
>
> Spokane & I. E. R. R. Co. vs. Campbell, 241 U. S., 497.

To permit the joinder of joint trespassers in such cases where the Safety Appliance Acts are involved (as in the case at bar) is to subject the co-defendants to liability without possibility of defense if they are guilty of any concurrent negligence, and renders them liable for the greatest damage of the most guilty although as between themselves and the plaintff they may have defenses which would prevent any recovery against them.

"A statute which subjects one man's property to be affected by, charged, or forefeited for the acts of another, on ground of public policy, should be strictly construed; it can not be done by implication."

2 Lewis Sutherland, Statutory Construction, Section 547, p. 1020.

The railway company is denied the right to plead contributory negligence or assumption of risk on the part of the injured employe where the Safety Appliance Act is violated, and hence the individual co-defendant is thereby effectively cut off from any defense of contributory negligence on the part of the plaintiff, because under the Georgia law "where several trespassers are sued jointly the plaintiff may recover against all damages for the greatest injury done by either." As the Supreme Court of Georgia said in this case:

"If the carirer and its engineer were jointly liable under the conditions stated in the second question a joint judgment would result against them, and they would be equally bound regardless of the fact that the duties imposed upon them are not the same. The jury would have no power in such a case to specify the particular damage to be recovered of each, since Civil Code, Sec. 4512, is not applicable to personal torts."

Lee vs. Central of Ga. Ry. Co., et al., 147 Ga., 428, 431. (Record, p. 64).

The case at bar affords a convincing illustration of the injustice resulting from joinder of defendants, to which the Supreme Court of Georgia had reference. If the allegations of plaintiff's petition are true, the Railway defendant is liable as in case of negligence **per se** for a violation of the Safety Appliance Act of Congress. The utmost diligence of the Railway to maintain the appliance in good condition

would not relieve it from liability; and no degree of contributory negligence on the part of plaintiff could be urged to diminish or curtail his recovery. If joinder of the defendant O'Donnell as a joint tort feasor with the Railway is permitted, he would be equally bound with the corporate defendant under a single judgment for the violation of the Safety Appliance Act. This is what the Supreme Court of Georgia had in mind when it said "the duties imposed upon them are not the same."

No case has ever been decided in Georgia contrary to the decision in the case at bar.

(2) **The decision of the State Supreme Court in the case at bar does not discriminate against the interstate employe.**

The attention of this Court has doubtless been attracted to the contention of petitioner's counsel, often repeated in their brief, that because petitioner was an interstate employe he was denied the right of joinder accorded to all other litigants in Georgia. This statement appears in various forms, and the argument is made that the Georgia courts have "discriminated against petitioner because he was an interstate employe." There is no foundation in fact for this statement or for the argument of counsel that the State Court has discriminated against petitioner as an interstate employe. The reasons given and the authorities cited by the Supreme Court of Georgia in support of its opinion clearly refute the statement and the argument of discrimination. We assert with confidence that no Georgia case has ever laid down a contrary rule of practice or has ever upheld the joinder of defendants where one was liable under a Federal statute and one under the common law or statute law of the State. No case in Georgia has ever upheld a joinder of defendants even under the State Employers' Liability

Act. On the contrary, the only decision under the State Act denied the joinder, and is cited by the Supreme Court of Georgia in the case at bar. (W. & A. R. R. et al. vs. Smith, 144 Ga., 737).

Counsel for plaintiff also argue that the decision of the State Court so construes the Federal Act as to deprive an interstate employe of rights against all others than his Federal employer. But this argument is a fallacy. It confuses the question of right of action or liability with the question of remedy. If the plaintiff has a right of action against the individual defendant, he might have asserted it in a separate proceeding. The State Supreme Court did not deny to plaintiff the right to proceed separately against the Railway Company under the Federal Act or against O'Donnell, the individual defendant, under the State law; it merely refused to entertain his action against the Federal employer jointly with one who was not the employer. The Federal Employers' Liability Act gives no right to the injured employe to sue the employer jointly with other tort feasors. Hence it is clear that the plaintiff could not demand this privilege in the State Court as a matter of right under the Federal Act. A State Court may not refuse to entertain an action by the employe against the employer under the Federal Act, but certainly it may decline to permit that which the Federal Act itself does not require—the joinder of the employer with one who does not sustain that relation to the plaintiff. In the Second Employers' Liability Cases, this Court, while holding that the State Court could not decline to entertain an action under the Act of Congress, clearly stated that it was not thereby intended to regulate State practice or procedure:

> "• • • we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of State courts or to control or affect their modes of procedure, but only a ques-

tion of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the Act of Congress and susceptible of adjudication according to the prevailing rules of procedure."

Second Employers' Liability Cases, 223 U. S., 1, 56, 57.

The second ground of the plaintiff's petition for certiorari filed in this Court is as follows:

"2d. The decision of the Georgia Court is of far-reaching effect in that it depriyes the interstate employes of the right which all courts, including the courts of Georgia, accord to other litigants of joining as defendants in one action all tort feasors whose concurrent negligence have injured him.

"A striking illustration of this inconsistency and injustice is found in the present record. The complaint is in two counts. The first is based upon the Federal Act. (p. 3 of record). The second is based upon the State Liability Act. (p. 5 of record). No complaint of misjoinder was made or adjudicated as to the second count, so that if petitioner had been injured while engaged in intrastate commerce he might, without challenge, have maintained his action against both respondents."

(Petition for writ of certiorari, p. 3).

Reference to the record in this case will show that this statement is entirely erroneous. Both defendants demurred to the petition as a whole (which included the two counts)

for misjoinder. See paragraph 3 of the Railway Company's demurrer, record p. 43; and paragraph 4 of O'Donnell's demurrer, record p. 45. In the trial Court, plaintiff expressly abandoned the second count of the petition, which was based on the State law (see recital in charge of the Court, record p. 52; also specification 1 in bill of exceptions, record p. 70). Therefore, the Court of Appeals could not and did not pass upon the question of misjoinder of defendants under the second count. The case was tried in the lower Court and decided in the Court of Appeals solely upon the first count which was based on the Federal Act. The opinion of the Court of Appeals recites these facts:

> "The defendants admitted in their amended answers that the plaintiff was injured while employed by the railway company in interstate commerce. Thereupon the plaintiff expressly abandoned the second count of the petition and the case proceeded to trial solely upon the first count, which was founded upon the Federal Employers' Liability Act." (Record, p. 65).

There was clearly no discrimination by the State Court against the interstate employe, because the State Supreme Court had distinctly held in a prior case under the State Employers' Liability Act that there was a misjoinder of defendants where the plaintiffs sought to join as a defendant with the employer one who did not sustain that relation to the plaintiff. W. & A. R. R. vs. Smith, 144 Ga., 737 (2). The Supreme Court of the State cited and followed this prior decision in the case at bar. (Record, p. 63; Lee vs. Central of Georgia Railway Company, 147 Ga., 428, 431).

The Smith case, supra, was the first decision of the Supreme Court of Georgia involving the question of joinder of defendants under the State Employers' Liability Act (Acts of Georgia, 1909, p. 160; Georgia Civil Code, 1910, Sec.

2782 et seq.); and the case at bar is the only other decision by that Court involving a similar question since the Federal Liability Act was passed.

If, under the Georgia practice, it is not permissible to join the employer and other tort feasors under the State Act, (as the Supreme Court has clearly decided in the Smith case), **a fortiori** it would be equally inadmissible under the practice of this State to join an employer liable under the Federal law with a tort feasor liable under the State law. If there is misjoinder where both defendants are liable under the laws of the same jurisdiction, there are stronger reasons for holding that there is misjoinder where one defendant is liable under the Federal Acts and the other under the State law. Such is the case at bar, and we therefore earnestly maintain that the Smith case, being the unanimous decision of the Court of last resort in Georgia, definitely settled this question of procedure under the State Employers' Liability Act, and the decision in the case at bar was the logical and consistent consequence of that prior decision when the question of practice was presented in a case under the Federal Act.

Counsel for plaintiff contend that the State Supreme Court in the Smith case did not hold that there was a misjoinder of defendants under the State Employers'Liability Act; and also that the Court erroneously cited and applied that case to the case at bar. These contentions, however, are entirely without foundation. That the Smith case (144 Ga., 737) did involve a misjoinder of defendants under the State Employers' Liability Act is plainly apparent. This is also the construction given to that decision by the State Court of Appeals when the case came before it on a second appeal. The Court of Appeals then said:

> "The action was brought under the Civil Code (1910), Sec. 2782 et seq. The deceased was employed by the Southern Railway Company. The Western &

Atlantic Railroad Company was made a joint defendant upon the theory that its negligence concurred in causing decedent's death. The defendants filed demurrers, which were overruled, and the case was taken to the Supreme Court, and it was decided that, the case having been **brought under the State 'Employers' Liability Act,' the action was demurrable at the instance of each of the defendants, for misjoinder of parties defendant,** and at the instance of the Western & Atlantic Railroad Company for misjoinder of parties plaintiff." (Heavy type ours.)

Smith vs. W. & A. R. R., 22 Ga. App., 437.

It is true that the Supreme Court in the case at bar inadvertently referred to the Smith case as an action by an employe whereas it was in fact an action by the parents of a deceased employe for his homicide. But this is of no consequence because the State Employers' Liability Act expressly gives a right of action to the parents or beneficiaries in cases of homicide, where no administrator has been appointed, and the rule regarding joinder of defendants in actions thereunder is necessarily the same whether the suit is by the employe for his injuries or by the parents or beneficiaries of the employe in case of his homicide. The mere fact that the State Supreme Court referred to the Smith case, sufficiently shows that it did involve a misjoinder of defendants, otherwise the citation would have had no application to the case at bar.

It is the well established rule in several of the States that a joint action will not lie against master and servant for negligence. It is said:

"The reason is that joint tort feasorship in cases of negligence necessarily implies a community of interest in the object and purposes of the undertaking and an equal

right to govern and direct the conduct of each other in respect thereto, and master and servant cannot be said to be engaged in a common enterprise because that relation is inconsistent with the relation of master and servant. Hence the rule."

Hobbs vs. Hurley (Me.) 104 Atl. Rep., 815.

The same rule prevails in Massachusetts, Connecticut, Pennsylvania, and Ohio.

Mulchey vs. Methodist Religious Soc. 125 Mass., 487.
Bailey vs. Bussing, 37 Conn., 349.
Betcher vs. McChesney, 255 Pa., 394. (100 Atl. Rep. 124).
Robbins vs. Pa. R. R., 245 Fed., 435.

It would scarcely be contended that an employe could, as a matter of right in an action under the Federal Employers' Liability Act in those States, maintain a joint action against the interstate master and another servant; and for like reasons the plaintiff's claim to such joint judgment in the case at bar must be denied, because the Supreme Court of Georgia (and the State Court of Appeals by direction of the Supreme Court) has decided that in such an action there is a misjoinder of defendants and of causes of action—that the master and the servant, the defendants in the case at bar, did not owe the same duty to the plaintiff, and accordingly it is decided by the Supreme Court of Georgia that "where there is no joint duty, there can be no joinder" (Record p. 68). And moreover, that Court, as already shown, had previously applied the same ruling to a case arising under the State Employers' Liability Act (W. & A. R. R. vs. Smith, supra), so that no foundation whatever exists for the plaintiff's contention that because he was a Federal employe, the State Court has discriminated in refusing

to allow him to proceed with an action brought jointly against the Federal employer and another wherein he seeks to subject both defendants to a single joint judgment for the greatest damage done by either.

Counsel for petitioner erroneously assume that the common law right to joint tort feasors has not been affected by the Employers' Liability Acts. We concede, of course, that the Georgia Courts in common with others have often upheld a joint right of action against tort feasors; but we deny that the Supreme Court of the State has ever held that the employe may join the master and co-employes as defendants under either the Federal or State Employers' Liability Act.

There are convincing reasons why an employe has not the right to join his employer with other defendants and proceed as in case of joint tort feasors under the Employers' Liability Acts. These statutes create new and plenary causes of action in favor of the employe. His rights are enlarged and amply protected by this legislation; whereas the employer is cut off from rights and defenses which it previously might have urged. Contributory negligence does not bar a recovery. Plaintiff may recover for his employer's negligence, although he may have been guilty of more negligence than the employer. If there is a violation of any statute enacted for the safety of employes, the master is liable for full damages and can not plead assumption of risk or contributory negligence.

> "It is a statute which permits recovery in cases where recovery could not be had before, and takes from the defendant defenses which formerly were available * * * It introduced a new policy and quite radically changed the existing law."
>
> Winfree vs. N. P. R. R., 227 U. S., 296, 302.

> "When the act is analyzed, it becomes apparent that it was the purpose of the Congress to confer rights and

benefits upon the injured employe which were denied him by the common law; and hence the existence of a common law right of action on the part of an injured employe cannot, in reason, be claimed in the presence of this Act of Congress."

Cound vs. A. T. & S. F. Ry. Co., 173 Fed. 527, 531.

Counsel for the plaintiff strongly rely upon Southern Railway vs. Miller, 1 Ga. App., 616 (s. c., 217 U. S., 209). But that case was not based upon either the Federal or State Liability Act. It was decided before Congress "took control of the liability of carriers in interstate transportation by rail to employes injured in interstate commerce." (S. A. L. Ry. vs. Horton, 233 U. S., 492); and counsel for Plaintiff have ignored the controlling question which arises in the case at bar, namely: How can the exclusive control of Congress over such liability exist if a State may, by virtue of its local statutes, impose a joint liability upon and authorize a single joint judgment against the interstate carriers and others as joint tort feasors and provide for contribution between the co-defendants? (Civil Code of 1910, Secs. 4512, 4513). It is evident that the Miller case, supra, would have been differently decided by the Court of Appeals of Georgia if the Federal Employers' Liability Act had been in existence at that time and the action against the railroad defendant had been founded thereon.

That the Federal Act does operate to destroy previously existing common law rights is well illustrated in a case where a father's common law right of action for loss of service of his minor son was declared not to exist since the passage of the Federal Employers' Liability Act. In that case it was said:

"The Court of Errors and Appeals ruled, and it is now maintained, that the right of action asserted by

the father existed at common law and was not taken away by the Federal Employers' Liability Act. But the contrary view, we think, is clearly settled by our recent opinions in New York Central R. R. Co. vs. Winfield, ante, 147, and Erie Railroad Co. vs. Winfield, ante, 170."

New York Central R. R. Co. vs. Tonsellito, 244 U. S., 360, 361.

In view of these authorities the fact that the common law right of joinder which previously existed is denied in an action under the Federal Act, affords no ground for the plaintiff's contention of discrimination against him as an interstate employe. There is no conflict or inconsistency in the decisions of the Georgia Court on the question of joinder under either the Federal or State Liability Act. The right asserted is denied in both cases. But it is clear that whatever might have been decided as to the State Act, the right to join defendants as tort feasors does not exist under the Federal Liability Act.

II.

THE WEIGHT OF AUTHORITY IS AGAINST THE JOINDER OF DEFENDANTS UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

The petition for certiorari in the case at bar urged as one of the grounds for issuing the writ that the decisions of the Courts in the various States were in conflict on the question of joinder, and cited the case of Doyle vs. St. Paul Union Depot Company et al., 134 Minn., 461 (159 N. W. Rep., 1081). No other case arising under the Federal Employers' Liability Act was mentioned by plaintiff as being in conflict with the decision of the Supreme Court of Georgia on this question. An examination of the opinion in the Doyle case, supra, will show that it is not even a persuasive authority in favor of

the right here claimed by the plaintiff to a joint judgment against the interstate employer and a co-employe as joint tort feasors, because: (a) It appears in the Doyle case that there was no objection raised to joinder of defendants, the demurrer was solely upon the ground of misjoinder of causes of action. The right to join causes of action was fixed by the Minnesota statute and the Court held it was sufficient to sustain the plaintiff's action. (b) The wide difference between the Minnesota practice and the Georgia practice in actions against joint trespassers obviously prevents any argument that the Doyle case conflicts with the case at bar. Under the practice in Minnesota the jury may return a verdict in different amounts against the several defendants sued as joint trespassers. This was expressly so stated by the Court in the Doyle case:

> "That the measure and amount of recovery against different defendants may be different, and in supposable cases they might be, is not important. If the defendants are liable in different amount, their different liabilities can be found and declared. See Rauma vs. Lamont, 82 Minn., 477, 85 N. W., 236."
>
> Ibidem, 159 N. W. Rep., p. 1082.

In the case at bar, on the contrary, the Georgia procedure and the statute under which the joinder was made provide a directly oposite rule:

> "Where several trespassers are sued jointly, the plaintiff may recover against all damages for the greatest injury done by either * * *"
>
> Ga. Civil Code of 1910, Sec. 4512.

Under the Georgia law the jury trying the case can not apportion the damages betwen the defendants in cases against joint trespassers. Lee vs. Central of Ga. Ry. Co., 147

Ga., 428, 431. The important distinction is, therefore, that a defendant Federal employer in a suit against it as one of several joint trespassers under the Georgia statute is bound to respond in damages for the greatest injury done by either one of its joint tort feasors, and the Federal Employers' Liability Act, instead of being exclusive as Congress intended, is completely set aside by the State law. In other words, if the plaintiff's contention prevails, the Georgia statutes fixing the damages against all the joint trespassers according to the greatest injury done by either and providing for contribution between the defendants, is the law which will really govern the case and not the Federal Employers' Liability Act which should, by reason of its supremacy, control the ultimate liability of the Federal employer.

For the foregoing reasons it is conceivable that in Minnesota a defendant employer liable under the Federal Act might possibly be joined with other defendants and the damages so apportioned as not to affect the liability of the interstate employer under the National statute. Even this seems doubtful. However, it is important to observe that in the Minnesota case the Supreme Court of that State merely followed its own prior opinions, construing the common law regarding joinder, in cases decided long before the passage of the Federal Employers' Liability Act. The Court did not consider the question how far the common law right to join joint trespassers was affected by that Act, or whether such right can be said to exist at all in view of the exclusive and inclusive character of the Federal statute.

A further important distinction between the Doyle case and the case at bar, which should not be overlooked, is that the former did not involve the Safety Appliance Act of Congress. In the case at bar, the Railway defendant, if guilty of violating the Safety Appliance Act as charged, would be liable for full damages without considering the

question of its negligence or diligence. The jury, under the Georgia procedure, being required in case of concurrent negligence to return a joint verdict for one sum against both defendants "for the greatest injury done by either," the individual defendant is also made liable, as if guilty of negligence per se, for his co-defendant's violation of the Safety Appliance Act. So that joinder of defendants, under the facts in this record, would be not only contrary to the scope and purpose of the Federal Employers' Act, but of the Safety Appliance Act as well. It would at the same time extend the exacting liability imposed by these statutes to co-employes and other joint trespassers in a manner which certainly was not intended by Congress when they were enacted.

The Court of Appeals of Kentucky, in a similar case, where co-employes were joined as defendants with the interstate carrier, held that dismissal of the action as to the individual defendants was required where plaintiff elected to proceed under the Federal Employers' Liability Act. In so deciding that Court used the following language which may appropriately be applied to the case at bar:

> "(2) After the Court had properly required the plaintiff to elect whether he would proceed under the Federal Act or the State law, and he had elected to proceed under the former, it necessarily followed that the action must be dismissed as against the two individual defendants, who were the co-employes of appellant, for the Federal Act provided only for recovery by employes against a 'common carrier by railroad while engaged in commerce between any of the several States,' and nowhere, either expressly or by inference, provides for a recovery by one employe against his co-employes. To have overruled this motion, after the election to pro-

ceed under the Federal Act, would have left pending one action under the Federal Act against the carrier, and another under the State law against the individual defendants."

Thompson vs. C. N. O. & T. P. Ry., et al. (Ky.), 176 S. W. Rep., 1006, 1008.

In the case at bar, it will be recalled, plaintiff elected to proceed under the Federal Act. He abandoned the second count of the petition which was based upon the State law. (See opinion of the Court below, Record, p. 65).

In another case a District Court of the United States decided that an individual could not be joined as a defendant with the interstate carrier:

"A master mechanic employed by an interstate railroad company cannot be made liable for the death of an engineer, under the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65); liability under such act being limited to common carriers engaged in interstate commerce."

Kelly's Admx. vs. C. & O. Ry. Co., et al., 201 Fed. Rep., 602 (1).

The same conclusion was reached in the Northern District of Georgia, where the Court, referring to the joinder of the individual defendant with the railway company, said:

"It is perfectly manifest that Avery is not liable under this act, as the act aplies only, by its terms, to 'common carriers by railroad while engaged in commerce between any of the several States,' etc."

Taylor vs. Southern Railway Co., 178 Fed. Rep., 380, 381.

To the same effect, see also:

Roberts Injuries to Interstate Employes, Sec. 145.
Richey Fed. Emp. L. Act (2nd Ed.) Sec. 128.

Instead of conflict of authority on this subject, as the petition for certiorari contends, there is practically complete accord that the joinder of co-employes as defendants with the interstate employer is not permissible under the Federal Act.

III.

THE DECISION OF THE HIGHEST COURT OF THE STATE THAT THE DEFENDANTS COULD NOT BE SUED JOINTLY AS TORT FEASORS IN THE STATE COURT IS CONCLUSIVE OF THE QUESTION.

It cannot be doubted that the State has power to regulate the remedy and modes of administering justice in its courts, and to establish rules of practice and procedure in cases within its jurisdiction. The question as to who are properly joined as parties to a suit for negligence must necessarily be determined by the law of the forum.

"Each State may, subject to the limitations of the Federal Constitution, determine the limits of the jurisdiction of its courts, the character of the controversy which shall be heard in them. * * *"

St. Louis & Iron Mountain Railway vs. Taylor, 210 U. S., 281, 285.

"There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of the action, sufficiency of the pleadings,

rules of evidence, and the Statute of Limitations—depend upon the law of the place where the suit is brought."

Central Vt. Ry. vs. White, 238 U. S., 507, 511.

"In an action brought in a State Court under the Employers' Liability Act, questions of procedure and evidence are to be determined according to the law of the forum; • • •"

C. & O. Ry. Co. vs. Kelly, 241 U. S., 485.

"Whether the State Court has obeyed a local rule of practice requiring the substitution of correct instructions for defective ones requested, is a question of State law not reviewable by this Court in an action under the Employers' Liability Act."

L. & N. R. R. vs. Holloway, 246 U. S., 525 (3).

"Where an action under the Federal Employers' Liability Act is tried in a State Court, local rules of practice are applicable. • • •"

C. & O. Ry. vs. DeAtley, 241 U. S. 311 (5).

And this is so because

" • • • the State law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law."

John vs. Paullin, 231 U. S., 583, 585.

In a case where a majority verdict in a State Court was upheld in an action under the Federal Employers' Liability Act, this Court said:

> "While a State Court may enforce a right created by a Federal statute, such court does not, while performing that duty, derive its authority as a court from the United States but from the State, and the Seventh Amendment does not apply to it."
>
> Minn. & St. Louis R. R. vs. Bombolis, 241 U. S., 211 (5).

The State Supreme Court and the State Court of Appeals in the case at bar held that under the State practice and procedure, joinder of the defendant O'Donnell with the railway company employer was improper and directed that the demurrers for misjoinder of parties and causes of action be sustained. In so deciding, the highest Court of the State said:

> "In such a case the rules of law applicable to the several defendants are not the same. To join defendants in one suit, they must owe the same duty. 38 Cyc. 483. Where there is no joint duty there can be no joinder. 29 Cyc. 565, note 71." (Record, pages 63, 68, 69).

That it was competent for the State Court to finally decide this question of State practice and that this Court will accept the ruling of the highest Court of the State as conclusive on the subject is plainly asserted in many removal cases. We quote from some of these decisions:

> "A State has an unquestionable right by its Constitution and laws to regulate actions for negligence, and

where it has provided that the plaintiff may proceed jointly or severally against those liable," • • •

the Federal Removal Statute cannot make it a separable controversy.

C. N. O. & T. P. R. R. vs. Bohon, 200 U. S., 221, 226.

"Whether defendants can be sued jointly as tort feasors is for the State Court to decide; • • •"

I. C. R. R. vs. Sheegog, 215 U. S., 308 (5).

"• • • it stands decided that in Kentucky the facts alleged and proved against the Illinois Central Railroad in this case made its lessor jointly liable as matter of law. This decision we are bound to respect."

Ib. p. 318.

"Whether there was a joint liability of defendants sued jointly for negligence is a matter of State law and this Court will not go behind the decision of the highest Court of the State to which the question can go."

C. R. I. & P. vs. Schwyhart, 227 U. S., 184 (1).

"If the State Court so decides, a plaintiff may join joint tort feasors even though the liability of one is statutory and the liability of the other rests on the common law."

C. R. I. & P. Ry. vs. Dowell, 229 U. S., 102 (5).

It is settled beyond controversy by these decisions that "whether defendants can be sued jointly as tort feasors is for the State Court to decide," and where that Court holds

the joinder is proper, its decision is binding on this Court. The converse of the proposition must also be considered as settled, namely, where the highest State Court decides that a plaintiff may not, under the local practice, join tort feasors as co-defendants in an action for negligence, the decision is likewise conclusive of the question. Such is the status of the case at bar. Neither expressly nor by inference does the Federal Employers' Liability Act authorize the injured employe to sue a co-employe. It does not purport to give a joint right of action against the Federal employer and other joint tort feasors. On the contrary, the object of this national legislation, which was to make uniform the liability of interstate carriers, excludes any idea that is was intended to confer such joint right of action. There being, therefore, no infraction of any right secured to the plaintiff under the Federal Act, this Court will accept as conclusive the decision of the highest Court of the State that there was a misjoinder of defendants and of causes of action in this case.

The decision of the Supreme Court of Georgia expresses the well-considered judgment of that Court. Its opinion was rendered in response to questions certified to it by the State Court of Appeals. After it had answered the questions so certified, the plaintiff applied to the State Supreme Court for a rehearing which was denied. (Lee vs. Central of Georgia Railway, 147 Ga., 248). When the case was again decided by the State Court of Appeals (Record, p. 74), the Supreme Court of the State denied an application for a writ of certiorari (Record, p. 75).

We earnestly contend, for the reasons herein set forth, that the question of joinder of defendant and of causes of action in the case at bar was rightly decided by the State Supreme Court and is in accordance with its established practice. Moreover, since it concerns merely a local rule of practice and violates no Federal right to which plaintiff was

entitled, this Court will not consider or determine whether the views of the State Court in this respect accord with its own.

> "This Court, ordinarily, will not inquire whether the decision upon matter not subject to its revision was right or wrong."
>
> Arkansas Southern Railway Co. vs. Germania National Bank, 207 U. S., 270.

The decision of the State Supreme Court, so far at least as any joint action against the individual defendant is concerned, must be final and conclusive on this question. The attempted joinder of the defendant O'Donnell in this case involved his rights and defenses as well as those of the interstate railroad carrier. Would it be competent for this Court, even if it should entertain a different view from the State Supreme Court, to reverse the judgment below with direction which would have the effect to subject the individual defendant to a **joint judgment** with the railway company? The co-employe is not made liable either jointly or severally to the injured empolye under the Federal Act. The liability of the individual defendant in the case at bar, if any exists, arises solely under the State law, as construed by the State Supreme Court. How then would it be competent for this Court to declare, in opposition to the decision of the State Supreme Court, that he should have been **jointly bound** with the raiwlay company in this action?

In the improbable event that this Court should now conclude that the employer might be joined with one or several joint trespassers in an action under the National statute—that a **joint liability** of the Federal employer with co-trespassers "for the greatest injury done by either" is consistent with the object and purpose of the Federal Employers' Liability Act—even so, under the State practice as declared by

the Supreme Court of Georgia, it would still not be permissible for the plaintiff to subject the individual co-defendant to a joint judgment in this State Court action. Since the Federal statute does not require such joinder it is clear that the question of misjoinder, **as to the individual defendant at least,** is a matter of State pleading and practice on which the decision of the State Supreme Court is binding upon this Court.

> Central Vermont Ry. Co. vs. White, 238 U. S., 507, 513.

The judgment of the Court below is that there was "a misjoinder of parties defendant and a misjoinder of causes of action." (Record, pp. 69, 74).

This, we submit, was a question of State practice and procedure for final determination by the Supreme Court of Georgia alone, that is, whether O'Donnell, a citizens of Georgia, against whom liability was asserted solely under the State law, could be subjected to a joint judgment in an action in the State Court, as co-defendant with the railway company, against whom liability was claimed only under the Federal statutes. We also confidently maintain that the State Supreme Court properly, and for sound reasons, decided against the plaintiff's claim to a joint action in the case at bar, and that the judgment of the Court below should be affirmed.

Respectfully submitted,

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